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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 739.

THE CHAS. WOLFF PACKING COMPANY, PLAINTIFF IN ERROR,

vs.

COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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The plaintiff in error has filed a reply brief in this cause. Inasmuch as the defendant in error has had no opportunity to present an analysis of several important decisions rendered by this court since the printing of its brief, it has prepared this supplemental brief.

Significant Omissions in Packing Company's Reply Brief.

The reply brief of the Chas. Wolff Packing Company makes conspicuous by absence of comment or mention thereon the following propositions:

1. That its business was and is affected with a public interest.

2. That the facts of general knowledge set forth in defendant-in-error's brief with reference to the unrest and emergency existing in the packing industry are true (Defendant-in-error's brief, pages 7-16).

No denial is made of the existence of the facts with relation to the emergency and public interest as related in our brief. The packing company merely complains that not all of these facts were introduced in evidence, and that it was necessary to introduce them, before the Industrial Court could acquire jurisdiction. In other words, while admitting that this court and any other court could take judicial notice of facts of general knowledge, yet the packing company contends that the Industrial Court could not take such judicial notice, but must have presented to it in the way of oral or written testimony all surrounding circumstances known to the public generally. It also contends that this court in passing on the question as to whether an order of the Industrial Court is clearly unreasonable and arbitrary cannot take judicial notice of those facts that were and are of general knowledge and which are set out in our brief.

We invite this court's attention to section 12 of the act in controversy (plaintiff-in-error's brief, p. 76), which pro-

vides that the Supreme Court of Kansas, in passing upon the order of the Industrial Court, may consider the evidence produced before the Industrial Court, and may also admit such additional evidence as it may deem proper, to be taken either in open court or by a commissioner. In this case the Supreme Court of Kansas, in determining whether the order in question should be put into effect, considered both the evidence produced before the Industrial Court and additional evidence taken before a commissioner appointed by the Supreme Court. All of this evidence is set out in the record. There is no question, and it is practically admitted, that there was evidence before the Supreme Court of Kansas that an emergency existed (R., 49; our brief, pp. 20-21, 49). The packing company, however, claims that this evidence, although it was introduced before the Supreme Court of Kansas, cannot be considered, because all of it was not formally offered before the Industrial Court. In our brief we discussed at length the facts which establish the existence of a public interest in the packing company's business and the emergency. These are not refuted. This court should accept the legislative declaration that the business in which the packing company is engaged is affected with a public interest, which is sustained by the Industrial Court, and which is substantiated by a specific finding of the Commissioner and independently approved by the Supreme Court of Kansas (R., 13, 119, 120, 129, 146).

The packing company contends that while this court has taken judicial notice of the facts and circumstances within common knowledge in passing on the validity of the Adamson Act, that the jurisdiction of an administrative tribunal may not be sustained upon facts and circumstances not es-

tablished at a hearing had before it. The commissioner, however, found that the Industrial Court acted upon its knowledge of general industrial conditions, and was justified in so acting (R., 139). In support of its contention the packing company cites the case of Wichita Railroad and Light Company *v.* Public Utilities Commission, 43 Sup. Ct. Rep., 51. That case, however, was one in which the order was held invalid because a finding was not made which was required by statute. There was no question in that case of the right to take judicial notice of facts of general knowledge, nor was there any question of whether or not there was sufficient evidence before the commission to justify the necessary finding. The order was condemned because the finding was not actually made as required by statute.

In United States *v.* B. & O. Railroad Co., 226 U. S., 14, and Oregon Railway Company *v.* Fairchild, 224 U. S., 510, and Interstate Commerce Commission *v.* L. & N. Railroad Company, 227 U. S., 89, the question was not whether or not a commission could take judicial notice of matters of general knowledge, but whether the commission could act upon information received by it outside of the hearing, which information related to matters not of general knowledge. There is no evidence in the record that the Industrial Court acted upon any information which it received *ex parte*, other than the information which it had in common with every other citizen in the land, and of which this court very rightfully takes judicial notice.

Judicial notice is taken of matters of general knowledge (Mueller *v.* Oregon, 208 U. S., 412), industrial, social, political, and economic conditions and changes and the general methods and course of business (7 Enc. Evid., 931,

934, 935, 938, 962), general facts relating to travel and transportation (*id.*, 933, 941), public acts, books, journals and records of legislative departments and the messages of the executive (*id.*, 960, 983, 984, 993), the object and conditions intended to be remedied by legislation, including any general condition which might aid in construction (*id.*, 961), the history of the country and the law, and the public necessities which caused the legislative enactment, as well as the public discussion relative to its passage and the reasons given therefor (*id.*, 962). So this court, recognizing these principles, has expressly said that its justices have power to refresh their memories and inform their consciences from such sources as they deem most trustworthy (Jones *v.* U. S., 137 U. S., 202) and for such purposes, to resort to such information as they may deem proper (Brown *v.* Piper, 91 U. S., 37), taking judicial notice of common experience and knowledge (Brown *v.* Piper, 91 U. S., 37; Phillips *v.* Detroit, 111 U. S., 604), legislative journals (South Ottawa *v.* Perkins, 94 U. S., 260; Railroad Tax Case, 8 Sawyer, 293, 13 Fed., 722, 767), public documents of the State before its annexation, and other historical facts in reference to boundaries in dispute between it and another State (Coffee *v.* Grover, 123 U. S., 1), the archives (Underhill *v.* Hernandez, 168 U. S., 250), rules and regulations (Caha *v.* U. S., 152; U. S., 211, 221, 222), and records (The Habana, 175 U. S., 677, 696) of a department, as well as official statements of the head thereof (Heath *v.* Wallace, 138 U. S., 573), and proclamations and messages of the President (U. S. *v.* The Three Friends, 166 U. S., 1, 64, 65; Jenkins *v.* Collard, 145 U. S., 546; Jones *v.* U. S., 137 U. S., 202, 212, 215; Armstrong *v.* U. S., 13 Wall.,

154). This court has also taken judicial notice that the public health is deeply concerned with the reclamation of swamp lands (Leovy *v.* U. S., 177 U. S., 621), and that fuel is a necessity of life (Jones *v.* City of Portland, 245 U. S., 217).

In Appendix F to this brief will be found facts with relation to the packing industry, and controversies therein of which judicial notice will be taken under the above authorities.

No complaint has been made by the packing company of the manner in which evidence was introduced before the Industrial Court or the Commissioner. No assignment of error is predicated upon the action of the Supreme Court or the Industrial Court in this respect. In fact, the packing company in its answer to the complaint filed in the Industrial Court in effect conceded the jurisdiction of the court (R., 11). It is to be noted that the specifications of error set forth in the packing company's brief (page 15) do not accord with the assignments of error filed in this cause at the time the writ of error was sued out from this court (R., 262). The latter are of such a general nature as not to raise the question of jurisdiction of the Industrial Court on the ground that there were not sufficient facts before the Industrial Court to show public interest or an emergency. This court, however, should look at the evidence as presented to the Supreme Court of Kansas, as it is that decision which is here for review. We contend that there was sufficient evidence before the Supreme Court of Kansas, coupled with its right to take judicial notice of matters of general knowledge, to sustain its judgment that the order in controversy is reasonable and proper.

The packing company, by its return, admitted the allegations of paragraph two of the alternative writ (the petition treated as an alternative writ of mandamus, R., 23) issued by the Supreme Court. One of those allegations is as follows:

> "That respondent's (the packing company's) business is the only establishment of its kind in adjacent territory, and creates a large and growing market for live stock, to the great benefit of the community and to the great benefit of persons engaged in the business of live stock, and to the great benefit of persons generally engaged in agriculture" (R., 1, 25).

By the ninth paragraph of its return, the packing company admitted in substance that at the time of the issuance of the temporary order of March 21st, there was impending throughout the United States a general strike of packing house employees which would have included the Wolff Packing Company's employees, and that the United States took cognizance of the impending general strike, and at the direction of the President, the Secretaries of Labor and Commerce secured a temporary adjustment of such controversy by agreement of the parties until September 1st, 1921 (R., 2, 25).

The record before the Industrial Court shows:

The strike of 1918 in the Wolff Packing Company plant (R., 186).

The dissatisfaction in the same plant in 1920 (R., 187, 211).

Wolff Packing Company's employees belonged to same union as workers in Big Five (R., 188, 189).

The district president of this union, who had jurisdiction

over six States, told opposing counsel at that hearing that the union would go down to complete defeat before it would sacrifice one minute of the eight-hour day (R., 189-190).

The local union entered into contracts with its employers as to working conditions, but could not strike after a strike vote was taken without the authorization of the International Executive Board (R., 189, 190).

The proposed new agreement was presented in January, 1921, and the demand of the employees that it be accepted by the company was met by refusal to discuss the matter and the posting of notice on January 14, effective January 17, reducing wages and taking away the eight-hour day (R., 184, 185, 186, 187).

The wages in the contract of May 10, 1920, were 10 to 15 cents per hour less than those paid in other packing centers in America (R., 189), but were to follow any changes made by future Alschuler awards (R., 7, 249).

The plant in question supplied three State penal and charitable institutions (R., 196).

Several meetings were held by the employees before instructions were given to prosecute the complaint in question before the Industrial Court (R., 194). Two hundred and twenty employees, both union and non-union, unanimously directed the institution of the complaint (R., 194). A list of 180 employees was furnished to the Industrial Court as among those who authorized the filing of the complaint (R., 196).

While the hearing was on, the notice posted by Swift and Company reducing wages generally and *abolishing the eight-hour day* was called to the attention of the court (R., 207). Opposing counsel appearing before the Industrial Court,

asked an admission that the Big Five had posted a bulletin reducing wages and abrogating *the eight-hour day* (R., 199). From this notice much dissatisfaction arose, and a strike was impending in different parts of the State (R., 199-200); for the district president, knowing the temper of his followers, had determined that the union should go down in defeat rather than sacrifice one minute of that *eight-hour day* (R., 190).

The Wolff Packing Company's answer before the Industrial Court admitted that a substantial controversy existed with its employees (Par. 6, R., 9).

Every threatened strike in the designated industries constitutes an "emergency," which authorized action by the Industrial Court. The preparation of meat for food is one of the designated industries.

A threat to strike in the Wolff Packing Company's plant imperiled the continuity of the production of food in Kansas. This would disturb the public peace. It would lessen the meat supply of the State, and, as the packing company alleges in its answer, it would destroy a free, open market for hogs and cattle. How much it would lessen the meat supply, how much it would affect the market for live stock, surely this court will not consider. It will certainly not determine the extent to which the peace of the State might be disturbed.

The emergency necessary to justify the exercise of the police power to protect the public peace and promote the public welfare need not affect a large number of people. The emergency in the Adamson law affected the whole country. The coal strike last year also affected a large number. The coal strike in Kansas in 1919-1920 affected part of the State,

while the Wolff Packing Company threatened strike affected a smaller number. By preventing it, the Industrial Court preserved the peace of an extensive community at and near Topeka. It also preserved the market for farmers and stock raisers who shipped their stock for slaughter to this company. The packing company was the only establishment of its kind in adjacent territory. It promoted the public welfare of such citizens of Kansas by furnishing them a "free, open" market for their live stock, which they would have lost if the plant had been shut down. The supply of meat in Kansas would have been lessened if the strike had not been averted. It prevented the starting of a conflagration which would have swept the State.

There surely was an emergency when a strike was imminent among the Big Five Packers which the President and three Secretaries in his cabinet composed by inducing both sides to accept a compromise. About the same time the Industrial Court made its temporary order in this case which was, on May 2, 1921, merged into the final order. If it was an emergency that caused the President and his cabinet to act, was it not also an emergency that caused the Industrial Court to act? The size of the company and plant does not determine whether it is affected with a public interest. If a small elevator in a little town (*Brass vs. North Dakota*, 158 U. S., 391) may be affected with a public interest equally with the large elevator in a city (*Munn vs. Illinois*), then why may not the packing company that buys its own hogs and cattle from the farmer and stock raisers be affected with a public interest equally with the stock-yards of the Big Five Packers (*Stafford vs. Wallace*)? This court has said (*Brass vs. North Dakota*) that size and importance in an

industry is a question of policy and not of power. That size of business is unimportant is established by *German Alliance Insurance Company vs. Lewis,* 233 U. S., 389.

It has been said that:

> "The barometer of prosperity is not the steel industry, it is meat consumption which is steadily increasing."

If meat consumption is the barometer of prosperity, then the packing industry which produces such a large part of the meat consumed is affected with a public interest. It follows that the Wolff Packing Company, one unit of the packing industry, is also so affected.

The Order is Temporary.

In the final opinion of the Supreme Court, it stated that the evidence showed the existence of an emergency (R., 145). The court held that the order of the Industrial Court of May 2, 1921, was *temporary* in effect. This appears in subdivision three of the syllabus in the following language:

> "3. Under proper circumstances, the Court of Industrial Relations can make an order *temporary* in effect slightly raising the wages of employees in a packing house plant and fixing the hours of labor, although the plant at the time the order is made is being operated at a loss."

Under the statutes of Kansas, the syllabus constitutes the law of the case (General Statutes of Kansas, 1915, section 7497).

Recent Cases.

Since the printing of our brief in this case this court has decided the case of Minimum Wage Board of the District of Columbia *v.* The Children's Hospital of the District of Columbia (April 9, 1923). There no question of public interest or emergency was involved, but this court recognized that where public interest or an emergency was involved freedom of contract must yield to the exercise of the legislative will. This court there said (p. 6):

> "There is, of course, no such thing as absolute freedom of contract It is subject to a great variety of restraints. * * * It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest:
>
> (1) *Those dealing with statutes fixing rates and charges to be exacted by business impressed with a public interest.* There are many cases, but it is sufficient to cite Munn *v.* Illinois, 94 U. S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld and, it may be noted in passing, so upheld even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. See Louisville & Nashville Railway Co. *v.* Mottley, 219 U. S., 467. *In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable.*" (Italics ours.)

Of the law held invalid in that case it was said (p. 13):

> "It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency."

A comparison between the Kansas Act, the Adamson Act, and the District of Columbia Act is set forth in Appendix E to this brief. A summary of the comparison is as follows:

Adamson Act.	*Kansas Industrial Court Act.*	*District of Columbia Minimum Wage Act.*
Applies to industry affected with public interest.	Applies only to industries affected with public interest.	Applies to all industries.
Passed to meet an emergency.	Passed to meet an emergency. Operative only in emergencies.	Operative regardless of emergency.
Temporary in nature.	Orders of Industrial Court temporary in nature.	Permanent in nature.
Does not deprive parties of right to agree.	Do not deprive parties of right to agree.	Forbids parties to agree.

Subsequent to the opinion in Minimum Wage Board of the District of Columbia *v.* The Children's Hospital of the District of Columbia, this court decided the case of Board of Trade of Chicago *v.* Olsen (April 16, 1923). The act questioned there declared in part:

> "Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest."

Of such declaration this court said:

> "The Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest. The Supreme Court of Illinois has so decided in respect to its publication of market quotations. New York & Chicago Grain Exchange *v.* Chicago Board of Trade, 127 Ill., 153. In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales of futures upon interstate commerce, we find no difficulty under Munn *v.* Illinois, 94 U. S., 113, 133, and Stafford *v.* Wallace, *supra*, in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest and is subject to national regulation as such."

If stockyards and grain exchanges are affected with a public interest, then certainly the packing industry is so affected and the declaration of the legislature of the State of Kansas to that effect is controlling.

The Commissioner's Findings on Losses.

Reference is made by the packing company to certain findings of the Commissioner with reference to the matter of losses. Under the decision of *State ex rel v. Foley*, 107 Kan., 608-613, where a party excepts to a finding of fact made by a commissioner appointed by the Supreme Court to take evidence, the finding becomes merely advisory and the court considers all the evidence in the case and itself determines the question of fact.

On the point as to the cause of the claimed loss in the operation of the plant, the Industrial Court excepted to the finding of the Commissioner. The Commissioner stated there was no evidence from which a definite deduction could be made of why the business of the respondent had been thus unprofitable for three years (R., 126, Finding No. 13). At the close of this finding the Commissioner said (R., 126):

> "In the absence of any showing in the evidence of mismanagement or other conditions which could and should be corrected accounting for the losses of the company in operation, it is found by the Commissioner that the plant could not operate without loss on the basis of the basic day and increase of wages provided in the order of the Industrial Court."

This statement is in conflict with the finding that there was no evidence from which a definite deduction could be made as to why the business of the respondent had been unprofitable for three years. It was also in conflict with the rule established by the decisions of this court that it is incumbent upon the party alleging a loss from an order of a public commission to show clearly and in detail the material

facts establishing the loss. There was no such evidence in this case. On this point the Supreme Court of Kansas independently found (R., 151):

> "The defendant is operating its plant at a loss. Why, does not appear from the evidence. At least, this court is unable to determine why, and for the purpose of this discussion, it is unnecessary to ascertain why. The plant may be badly located on account of transportation facilities. There may have been managerial mismanagement. A part of the money arising out of the operation of this plant may have been taken by the Allied Packers and used in the operation of the other plants conducted by them. It may have been that the loss was due to unstable conditions in livestock and meat markets prevailing during the time covered by the investigation of the Court of Industrial Relations."

Confiscation.

Another remarkable thing about the packing company's reply brief is its failure to challenge the authorities referred to in our brief (pp. 70-78) to the effect that the exercise of police power is not unconstitutional because it may incidentally cause loss or damage to some individual or corporation. All that plaintiff in error states in this respect is:

> "After a careful consideration of the arguments advanced by the industrial court, the packing company takes leave to say that the questions involved in this writ of error are whether the State of Kansas can fix the wages to be paid by the owners of packing houses to packing-house employees and by increasing the company's payroll cause it to suffer additional loss at a time when its operating expenses and costs

> of raw material exceed its revenue from sales. If this can be done by the Kansas Legislature, the judgment of the Kansas Supreme Court can be affirmed."

It is almost the identical language used by the appellee in Wilson *v.* New, *supra*, in its unsuccessful attack upon the Adamson Act. In Board of Trade of Chicago *v.* Olsen, *supra*, it was alleged in the petition and admitted by the motion to dismiss:

> "That if the Board were required to admit representatives of cooperative associations of producers with the privilege of dividing with their members the proceeds of commissions less expenses, it would greatly impair the value of its memberships to other members."

Of this conceded infliction of loss upon the individuals by the passage of the act, this court said:

> "Congress may, therefore, reasonably limit the rules governing its conduct with a view to preventing abuses and securing freedom from undue discrimination in its operations. The incidental effect which such reasonable rules may have, if any, in lowering the value of memberships does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the National Government."

With this recent enunciation from this court on the question, it must be held to have been determined that the order here involved is not violative of the Fourteenth Amendment, being a proper exercise of the police power, although the order may incidentally cause additional loss to the packing company.

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Conclusion.

The emergency existed here in three different ways:

1. There was an emergency because there was a strike threatened. This court has decided in Wilson *v.* New that an impending strike constitutes an emergency because it interferes with the peace and public welfare of the community.

2. There was an emergency because the food supply of the State or a part of it was imperiled, by this plant's cessation of operations.

3. There was an emergency because the stock-raisers and farmers of the state would have had their free and open market for their live stock interfered with by this plant ceasing to operate. It was the only plant in adjacent territory.

Each and all of these three things did occur in the instant case, as has been found by the Industrial Court, the Commissioner and the Supreme Court of Kansas. These findings are sustained by the evidence and the admissions of the parties.

The judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX E.

Comparison of Kansas Industrial Court Act as Applied in Wolff Case, with Adamson Act, and with District of Columbia Minimum Wage Act.

Public Interest.

Adamson Act (as interpreted by Supreme Court of United States).

"The law is concerned only with those who are engaged in a business charged with a public interest." Wilson *v.* New, 243 U. S., 332, 353.

Kansas Industrial Court Act as applied in Wolff Case (as interpreted by Supreme Court of Kansas).

"The operation of the following named * * * industries is * * * declared to be affected with a public interest * * * (1) The manufacture * * * of food products * * *" Kansas law, sec. 3.

"The legislature has declared that its business is affected with a public interest, and for that

District of Columbia Minimum Wage Act (as interpreted by Supreme Court of United States).

"It applies to any and every occupation in the district, without regard to its nature or the character of the work." Adkins *v.* Children's Hospital, — U. S., —, decided April 9, 1923.

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reason has assumed to exercise control over it. For a recital of the facts justifying that declaration, *The State ex rel. v. Howat*, 109 Kan., 376, is referred to." Opinion of Supreme Court of Kansas, 109 Kans., 639 (R., 40).

Adamson Act.

"The organizations representing the employees of the railroads * * * made a formal demand * * * that * * *

"The employers refused the demand, and the employees took steps to call a general strike * * *

"The President * * * pointing out that * * * to save the commercial disaster, the property injury, and the personal suffering * * * if a strike was not prevented, asked Congress * * *

"Congress responded by enacting the statute whose validity * * * we are called upon to consider." Wilson *v.* New, 243 U. S., 342.

Kansas Industrial Court Act.

"In case of a controversy arising between employers and workers * * * if it shall appear to said court * * * that said controversy may endanger the continuity or efficiency of service of any of said industries * * * or affect the production * * * of the necessaries * * * of life * * * or produce industrial strife, disorder, or waste, or endanger the orderly operation of such industries * * * and thereby endanger the public peace or threaten the public health * * * jurisdiction * * * granted to said court * * * to investigate * * * make * * * temporary findings and orders * * * take evidence, * * * and to settle and ad-

District of Columbia Act.

"It is not a law * * * to meet and tide over a temporary emergency." Atkins *v.* Children's Hospital, *supra.*

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* * * and to settle and adjust all such controversies * * *" (Kansas Law, sec. 7).

The Industrial Court found this to be a case in which findings and order could be made under section 7 (R., 11).

The Commissioner found such an emergency (R., 119).

The Supreme Court found such an emergency (R., 145, 146).

"If the Adamson law was compelled by an emergency, the Kansas Industrial Court law was likewise compelled by an emergency. The purpose of the latter law is to meet such emergencies as will prevent a suspension or interference with the operation of the several kinds of business named in that law." Opinion Supreme Court (109 Kans., 645) (R., 45).

Adamson Act.

"Sec. 3. That pending the report of the commission * * * and for * * * thirty days thereafter, the compensation of railway employees * * * shall not be reduced * * *" Adamson Act, quoted 243 U. S., 344.

The standard of wages was "for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements between the parties." Wilson v. New, 243 U. S., 351.

"But this was not a permanent fixing (of wages) but, in the nature of things, a tempo-

Kansas Industrial Court Act.

"Section 8 of chapter 29 of the Laws of 1920, the court of industrial relations act, provides that—'If either party to such controversy shall in good faith comply with any order of the court of industrial relations for a period of *sixty days* or more, and shall find said order unjust, unreasonable or impracticable, said party may apply to said court of industrial relations for a modification thereof. * * *'

The order of the court of lations, in its opinion * * * said:

'Any order made by this court after having been put into force and effect for a period of sixty

District of Columbia Act.

"The board is authorized: * * * 'To ascertain and *declare* * * * (A) Standards of minimum wages for women in any occupation * * * and what wages are inadequate.'"

"Moreover, in sustaining the wage feature of the law (Referring to the Adamson Act), emphasis was put upon the fact that it was in this respect temporary 'Leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time.' The act was not only temporary in this respect but it was passed

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rary one which left the will of the employers and employees to control at the end of the period, if their dispute had ceased." Wilson *v.* New, 243 U. S., 356.

"We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before, and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads." Ft. Smith & W. R. Co. *v.* Mills, 253 U. S., 206, 209.

days, may be reviewed at the instance of either party. * * * The order made in this case at this time will be made in view of that provision of the law. The business conditions of the day are unusual and unstable, and sixty days or ninety days may bring about such changes as would require a revision of any order made herein.'" Opinion Supreme Court, R., 149.

The order of the court of industrial relations contained the following provision: "This order shall take effect and be in force on the 1st day of May, 1921, and shall continue until changed by the court or changed by agreement of the parties with the approval of the court."

to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. *Here they are forbidden to agree."* Atkins *v.* Children's Hospital, *supra.*

APPENDIX "F."

(Prepared by the Bureau of Labor Statistics and the Division of Conciliation, United States Department of Labor.)

Controversies in the Packing Industry.

Since 1917 peace has been maintained in the packing house industry under machinery set up by the Government. This agreement was first arranged by the President's Mediation Commission with Judge Samuel Alschuler as administrator. Its object was to adjust all matters in dispute and insure continuous production. In 1919 the agreement was renewed, and was to terminate one year after the declaration of peace. A dispute arose over the question of whether the war actually ended with the signing of the armistice or with the formal declaration of peace by Congress or the President. Finally, on December 13, 1920, at the close of a joint wage hearing Judge Alschuler advised both parties that he could not continue longer as administrator, and urged that the parties at interest work out some plan of adjudication for future disputes in the industry, which would be mutually acceptable and practicable to the great packing houses with their more than 70,000 employees.

On January 14, 1921, the attorneys for the packers, in behalf of their clients, addressed a letter to the Secretary of Labor calling attention of the desire of Judge Alschuler to retire, and asserting that the period for which the packers had signed a renewal had in reality expired, and asking the Secretary of Labor to terminate the agreement. Conferences

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were held on the 11th of February at which the Secretary of Labor, Judge Alschuler, the Director of Conciliation, and former members of the President's Mediation Commission who had written the agreement in the first instance, and the attorneys for both the packers and their employees were present. At this meeting both sides were asked to continue the agreement until May 1, 1921, in the event that the packers would not agree to a longer period. The employees agreed, and the attorneys for the packers stated that they must first confer with their employers. Judge Alschuler intimated that he would remain for a brief period longer, provided certain office and clerical help were provided. On February 21, 1921, Messrs. Condon and Meyer on behalf of their clients notified the Secretary of Labor that the agreement would be considered at an end. The Secretary notified both employees and the Federal arbitrator of the decision of the packers.

Following the withdrawal from the Alschuler administration, a reduction in wages of eight cents per hour for hourly workers and 12½ per cent for piece workers, effective March 14, was announced. Overtime rate of pay was to apply after ten hours work instead of eight, or after fifty-four hours a week; retention of the guarantee of forty hours work a week was announced; the Armour plant announced a new plan for employee representation to be put into immediate effect.

Representatives of the employees wired the President, protesting the alleged violation of agreement on the part of the packers. The President referred the matter to the Secretary of Labor, who issued an invitation to both sides to send representatives to Washington to confer with him in an effort to reach an amicable adjustment. The invitation was

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accepted by both sides and the date set for March 21, 1921. In the meantime the international unions involved held a conference in Omaha, Nebraska, and decided to take a referendum strike vote throughout the packing centers of the United States to be effective should efforts at adjustment fail. This vote was taken and was said to be overwhelmingly in favor of a strike.

Secretary Davis invited Secretaries Hoover and Wallace to co-operate with him in an attempt to reach an adjustment. Some days prior to March 21st, Attorneys Condon and Meyer were heard by the Secretary of Labor. On the morning of March 21st the representatives of the employees were given a private interview with the secretary. At 2 p. m. on March 21st, a joint conference of both sides was called to order by Secretary Davis, the following participating: Secretaries Hoover, Wallace, and Davis, Assistant Secretary E. J. Henning, Director of Conciliation Hugh L. Kerwin, Commissioners of Conciliation Hywel Davies and E. P. Marsh, Attorneys Condon and Meyer, representing the packers; Attorney Redmond S. Brennon and Mr. Dennis A. Lane representing the employees. The time was occupied in hearing statements from both contending parties, with pertinent questions interjected by the cabinet members, and an adjournment was taken at 6 o'clock.

At 8 p. m. an executive session was held in which the Federal officials present at the afternoon session discussed the situation. At nine-thirty that night the attorneys for the packers were sent for and lengthy discussion ensued between them, the cabinet members, and the Assistant Secretary of Labor. The morning of the 22nd the Secretary and Assistant Secretary of Labor called the representatives of the employees

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into conference and the balance of the day was spent in alternate conferences with both sides. Negotiations continued throughout the day of the 23rd and complete agreement was reached that afternoon.

The agreement provided that the reduction in wages effective March 14, 1921, should not be subject to further arbitration; that eight hours should remain the basic workday, with time and one-half paid in excess of eight hours, with the right of either party to appeal to the arbitrator for change; that during the life of this agreement any appeals for changes as to hours or wages must be submitted in written brief unless otherwise requested by the administrator; that this agreement shall absolutely terminate September 15, 1921; that with the exception of modifications noted the Alschuler rulings and administration should remain in force until September 15, 1921. This agreement took the form of a separate letter from the representatives of each side to Secretary Davis.

On March 24th Secretary Davis addressed a telegram to Judge Alschuler requesting him to continue as administrator during the remainder of the agreement period. Judge Alschuler replied by wire the same day, accepting the reassignment.

The Alschuler agreement expired September 15, 1921. On October 21st the union voted to vest the executive board of the union with power to call a strike if it became necessary. On November 9th four of the big five packers requested their employees to consider in the plant councils a reduction in pay.

On November 18th it was announced that the employees, through the plant councils, voted to accept a wage reduction

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of about 10 per cent, which was to become effective on November 28th. On December 1st the executive board of the union announced a strike, effective December 5th, in all plants where wage reduction was put into effect. The union claimed the strike was effective in all plants of the big five. The packers maintained that conditions were nearly normal. On December 8th the Department of Labor tendered its good offices with a view to bringing about an adjustment.

Mr. O'Hern, for the packers, stated they could not agree to a conference with anybody except representatives of their industrial plan. Mr. Lane, for the unions, advised that the men would return to work if the packers would arbitrate or rescind the wage reduction.

On December 13th and 14th the Secretary of Labor conferred with representatives of the packers at Chicago with the object of adjusting matters. On the same day the Department assigned a conciliator to take up the strike situation in New York City. On December 14th a commissioner was assigned to East St. Louis. On December 17th the Ft. Worth situation was taken up, and on this date a commissioner was also assigned to the Denver controversy.

Our information is that on January 23d Mr. C. J. Hays of the union, made public a letter wherein it was set forth that Commissioners Nelson, Rodgers, and Marshman, of the Department of Labor, called at his office under instructions from Mr. Hugh L. Kerwin, Director of Conciliation of the Department, and gave out the information that the Department had put forth every effort to bring about mediation and arbitration without success, and that the striking packing-house workers should not hold out longer with the

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hope of the intervention of any Government agency. He also stated that the Commissioners, from their observation in many centers, suggested that a vote of the strikers be taken regarding the calling off of the strike. Mr. Hays further stated that the Department of Labor would use its best efforts to eliminate any discrimination against former employees. He therefore requested that the butcher workmen and allied mechanical trades gather and assemble in proper halls for the purpose of voting on the calling off of the strike. Secret ballots were to be taken on Thursday, January 26th, and telegraphed to general headquarters of the union.

The Strike of 1921.

Our records show that a brief strike of Chicago packing-house employees occurred in July, 1919, because the men "disliked to have guards around the plants." The following account of this disturbance is from the *New York Evening Post* of July 21, 1919:

> "Chicago, July 21.—*Ten thousand* employees of the five big packers who have been on a strike for several days returned to work this morning after the employers had complied with the demand of the men that all police and special guards be withdrawn from the various plants.
>
> "The men announced that they will demand an increase of 30 per cent in wages through Federal Judge Samuel Alschuler, who is acting as arbitrator between the packers and their employees. The men, it is said, have agreed to abide by the decision of Judge Alschuler. Eighty thousand stock-yard employees are involved in the demand for higher wages."

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Another strike was reported for Chicago on August 8, 1919, following race riots due to the employment of negroes in the yards, and

> "started over a demand of the men that the guards placed about the plants be withdrawn. The men said they had no objection to working with negroes if they were union men, but objected to working with non-union men, and particularly under guards."

Another statement says they refused to work with negroes under police protection.

The exact number of men on strike is not known, but is supposed to have been about 65,000.

The following statement concerning this strike is from the New York *Evening Post* of August 11, 1919:

> "Chicago, August 11.—Striking employees of the packing plants at the stock-yards returned to work today after the last of the police guards had been withdrawn by Chief Garrity, in accordance with an agreement reached last Saturday. There was no report of trouble between the white and negro workmen and every plant was said to be in full operation for the first time in more than a week.
>
> "Officials of the Stock Yards Labor Council declared they would continue their efforts to unionize all the packing-house employees."

An important strike of packing-house employees began about December 5, 1921, because of wage reductions, and included Chicago and all the large packing-house cities. About 50,000 strikers were involved. This strike is considered to have ended about January 28, 1922, after being

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called off by the "Union Executive Council." Accounts differ as to the number of men on strike in Chicago; one union source gave it as 12,000. This strike was characterized by rioting in Chicago and other cities.

Extract from the Tenth Annual Report of the Secretary of Labor, October 1, 1922.

The Packing-house Strike.—On September 15, 1921, the Alschuler agreement, through which peace had been maintained in the packing-house industry since the war period, came to an end. On October 21, the union voted to invest its executive board with power to call a strike if such action became necessary. This action was taken in anticipation of announcements of wage reductions by the packers. Four of the Big Five packers had established plant councils in their establishments, and on November 9, these packers requested their employees, through the plant councils, to accept a reduction in pay. On November 18, it was announced that the employees had accepted a reduction of about 10 per cent, which was to become effective on November 28. On December 1, the executive board of the union announced a strike, effective December 5, in all plants where the reduction was put into effect. On December 8, the Department of Labor tendered its good offices with the view of being helpful in arriving at an adjustment. The union agreed to call off the strike and return to work if the packers would arbitrate or rescind the wage reduction. The latter refused to deal directly with the union, which was in line with the former policy, but agreed to take up all matters of dispute through the plant councils.

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On December 13 and 14, the Secretary of Labor conferred with representatives of the packers at Chicago in an effort to find a basis of settlement. On the same day commissioners of conciliation were assigned at New York City and East St. Louis, and later at Fort Worth, Denver, Oklahoma City, and other points. It was soon found that settlements in the various cities affected were contingent upon an agreement being reached in Chicago.

Unskilled workers in the packing-house industries constitute 65 per cent of the total employees. Their hourly wage, prior to the announced wage reduction, was 45 cents per hour, having been reduced in March, 1921, from 53 cents. The reduction of November 28, made the scale 37½ cents per hour for this class of labor.

The efforts to effect an adjustment were unsuccessful, and after a strike of many weeks it was called off by the union and work was resumed on the companies' terms.

Guarantees of Time Per Week Prior to Alschuler Awards.

Guarantees of time per week existed in the packing industry before the Alschuler awards and prior to 1917. See Bulletin of the United States Bureau of Labor Statistics, No. 252, p. 62.

Hours of Labor.

The following statements and data are taken from Bulletin No. 294, of the United States Bureau of Labor Statistics—United States Department of Labor, entitled "Wages and Hours of Labor in the Slaughtering and Meat Packing Industry, 1921":

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"The present study was made in April, 1921, and was limited as to 34 representative establishments, all of which were included in the 1917 report. The 1921 data cover 32,217 employees. The data used in the compilation of both reports were obtained from the pay rolls of the establishments and through inquiries made by agents of the bureau who visited the establishments (p. 3)."

* * * * * * *

"The slaughtering and meat-packing industry is the largest engaged in the production of food products, and is also one of the largest and most important industries in the United States. It has become an actual necessity, not only to the people in the large cities and industrial centers, but also to those in small cities and villages. To a very great extent the people of the whole country are dependent upon the large meat-packing establishments for cattle, hog, sheep, and calf products (p. 3).

* * * * * * *

"The establishments covered in this report represent every large and important meat packing center in the United States. Data was obtained from representative establishments of Armour & Co., Cudahy Packing Co., Morris & Co., Swift & Co., Wilson & Co., and 10 other companies. The bureau here expresses its appreciation of the co-operation and courtesy extended by all of these companies (p. 5).

* * * * * * *

"*Table 4.—Basic or Regular Hours, Guaranteed Hours of Pay, Proportionate increase of pay for overtime and for work on Sundays or Holidays, and date and amount of Reduction of Wages, by District and Establishment,* 1921" (p. 16).

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(In this table 4 the following numbers of establishments, that is, meat packing plants, are covered in the respective districts: Seven in District 1, ten in District 2, four in District 3, four in District 4, four in District 5, and five in District 6.) This makes a total of thirty-four meat packing plants. As before stated, they are representative plants and have 32,217 employees. In Districts Nos. 1, 2, 3, and 4, the basic or regular hours were eight hours per day and forty-eight hours per week. The guaranteed hours of pay per week were forty, except in plant No. 4, District No. 3, at which plant there was no guarantee. Overtime at time and one-half was paid for work in excess of the basic or regular hours per day. On Sundays and holidays all of the hours were paid for at double the regular rate.

(In District No. 5 the basic day was eight hours excepting on Saturday in plant No. 1 where it was four hours, and excepting in plant No. 3 where it was nine and one-half hours on each week day but Saturday, and on Saturday was five hours; and excepting in plant No. 4, the basic day was ten hours. In District No. 5, the basic hours per week were: In plant No. 1, 44 hours; in plant No. 2, 48 hours; in plant No. 3, 52½ hours; in plant No. 4, 60 hours. There was no guarantee of hours per week in District No. 5, and overtime was paid for at the basic or regular rate per hour. In plant No. 1, work on Sundays and holidays was paid at the basic or regular rate per hour, and likewise in plant No 2, and plant No. 4. In plant No. 3, work on Sundays or holidays was paid at one and one-half times the basic or regular rate.

(In District No. 6 the basic day was eight hours, and the basic week 48 hours, excepting in plant No. 5 where the

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basic day was 10 hours for Monday, 10½ hours on the days from Tuesday to Friday, and 8 hours for Saturday, and the basic week was 60 hours. In District No. 6 there was a guarantee of forty hours of pay per week in plants Nos. 1, 3, and 4, but no guarantee in plants Nos. 2 and 5. In District No. 6, overtime was paid for at one and one-half times the basic or regular rate excepting at plant No. 5, where it was paid for at the basic or regular rate. In District No. 6, work on Sundays or holidays was paid for at one and one-half times the basic or regular rate in plants Nos. 1 and 2, at double the basic or regular rate in plants Nos. 3 and 4, and at the basic or regular rate in plant No. 5.) (Pages 16 and 17, *Id.*)

The following data is taken from the *Monthly Labor Review* of August, 1922. Vol. XV, No. 2, published by the Bureau of Labor Statistics of the United States Department of Labor, pages 88 and 89. The first paragraph under this heading is as follows:

> "The following table taken from census reports shows the average number and per cent of wage earners working each specified number of hours per week in the manufacturing industries of the United States in the years, 1909, 1914 and 1919, together with the cumulative per cent of employees working each specified number of hours per week or less.
>
> "The number of employees reported is the average for the year, and was obtained by taking the actual number of wage earners at the close of one pay-roll period for each month in the year and dividing the sum of these wage earners by 12.
>
> "All of these employees of each establishment were classified as working the regular hours of the plant as a whole, although some of the employees may have

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worked different hours. It is believed that there would be no material difference in the number shown in each classification were the hours of each individual reported instead of taking the hours of the plant as a whole." (P. 88.)

Under the heading: "Regular hours of work per week in the manufacturing industries of the United States, 1909, 1914, and 1919," on page 89, *Id.*, the following information is given:

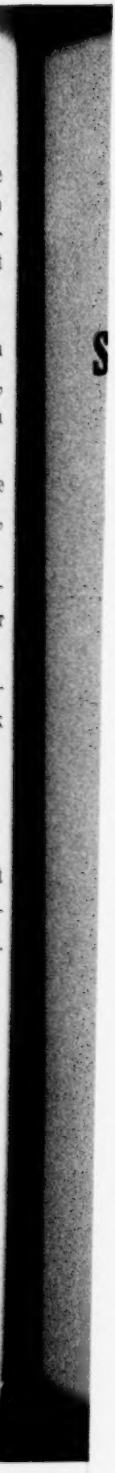
In the year 1909 the total number of employees in the manufacturing industries was 6,615,046, of whom 523,652, that is 7.9% worked 48 hours per week or under.

In 1914 of 7,036,247 employees in the manufacturing industries, 833,330 or 11.8% worked 48 hours per week or under.

In 1919 of 9,096,372 employees in the manufacturing industries 4,418,603, that is 48.6% worked 48 hours per week or under.

References to Kansas Industrial Court Act.

For list of references on the Kansas Industrial Court Act see Appendix to Bulletin No. 322 of the United States Department of Labor, Bureau of Labor Statistics (April, 1923).



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No. 739.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

THE CHAS. WOLFF PACKING COMPANY,
PLAINTIFF IN ERROR,

VS.

COURT OF INDUSTRIAL RELATIONS
OF THE STATE OF KANSAS,
DEFENDANT IN ERROR.

ERROR FROM THE SUPREME COURT OF
THE STATE OF KANSAS.

BRIEF AND ARGUMENT IN REPLY, ON BEHALF OF THE PLAINTIFF IN ERROR.

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Further as to the so-called "Emergency."

The case argued in the industrial court's brief is not the case tried and decided by the Kansas Supreme Court. On page 5 counsel for the industrial court say: "A survey of the packing industry as a whole is necessary to a proper understanding of this case. This court has held

that it will take judicial notice of all matters of general knowledge. It should refer to the law that created the industrial court and then to the emergency that caused the industrial court to act." Then follows (p. 9) a survey of the packing industry throughout the United States, with particular reference to the large packing companies operating under what is called the Alschuler arrangement. Many facts and circumstances are set forth relating to wage controversies between packing house employes and the great packing companies, strikes, riots and violence during the year 1921. On page 15 it is said: "The packing industry was maintained in peace from 1917 to September 16, 1921, under the Alshuler Agreement, but when this agreement ended the general strike occurred. The above events in 1921 show that there was uneasiness, controversies, strikes, riots, calling out of national guards and bloodshed accompanying the controversies between employers and employees in the packing industry as to wages, hours of labor and working conditions. The industrial court, believing that an emergency existed, attempted by the order of May 2, 1921, to avert and prevent such a disturbance of the public peace and public welfare as occurred in other states. Its order was neither clearly unreasonable nor arbitrary and did have a relation to the purpose of preventing a strike in this industry."

In striking contrast is the statement of the case by the Kansas Supreme Court (R. 145-146):

> "The evidence, which was taken by A. L. Noble, of Wichita, who was by this court appointed

commissioner to take the evidence and make findings of fact and conclusions of law, shows that the defendant was engaged in operating a packing plant in the City of Topeka for the purpose of slaughtering animals for food; that the defendant employed about three hundred workmen in the operation of its plant; that a controversy arose between the defendant and its employes concerning wages, hours of labor and certain conditions under which the employes worked; that a meeting of the employes was called for the purpose of voting on a proposition to strike on account of the controversy; that at the meeting thus called, the employes voted to present the controversy to, the plaintiff rather than to strike; and that thereafter a complaint was filed with the plaintiff. It is now insisted that the evidence does not show such an emergency as gives the plaintiff jurisdiction to make any order on the complaint that was filed.

On the former hearing, it was contended by the defendant that the pleadings did not allege that such an emergency existed as gave to the plaintiff the extraordinary power of regulating the wages to be paid by the defendant to its employes. This court in the syllabus to the former opinion said:

'The petition filed in this action alleged that such an emergency existed as justified the court of industrial relations in making an investigation.'

What was said in the former opinion is approved. The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas; yet, the plant manufactures food products and supplies meat to a part of the people of this state, and, if it should cease to operate, that source of supply would be cut off. The plant comes within the operation of the law, and the court of industrial relations has the power to

make the orders provided by law under the circumstances named in the statute. The petition alleged facts which show that such an emergency as the law contemplates existed and gave to the plaintiff authority to enquire concerning the matters alleged in the complaint. The evidence established facts sufficient to give to the court of industrial relations authority to make proper orders thereunder."

In the dissenting opinion the following comment is made upon the forgoing statement (R. 152):

"The complaint to the Court of Industrial Relations alleged broadly that the controversy between the defendant and its employes was one which endangered continuous operation and efficiency of the service rendered by the defendant's plant and that the controversy affected, and would affect, the manufacture and production of commodities necessary for human food within the state of Kansas. The petition to this court pleaded this complaint and the court properly enough held that the petition sufficiently alleged an emergency had arisen which justified the industrial court in taking cognizance of the complaint (*Court of Industrial Relations* v. *Packing Company*, 109 Kan. 629, 635, found in this record on page 37). The court now says, in effect, that the evidence taken by Commissioner Noble established the fact that an emergency had arisen such as the statute contemplates. Presumably the court refers to evidence bearing upon the meager facts stated in the opinion. If the court refers to other evidence establishing a statutory emergency, I have not been able to discover it by searching the record."

It is at once apparent that the judges of the state Supreme Court differed only as to the effect of the evidence in the record. The majority held that the evi-

dence in the record established an emergency such as the statute contemplated. The dissenting judges thought the statute required proof of a discomforting shortage in the state's food supply to justify the industrial court taking cognizance of the controversy; and, upon a full examination of the record, concluded that the facts stated in the court's opinion were the only facts shown by the record and were insufficient to establish the conditions precedent required by the act. The Kansas Supreme Court never considered or decided a case involving the facts now appearing in the industrial court's brief.

It is true that in considering the validity of the Adamson Act, this court in Wilson vs. New reviewed facts and circumstances within common knowledge evidently considered by Congress when it enacted the statute; and, it is also true that the Kansas Supreme Court reviewed facts and circumstances within common knowledge in considering the validity of the industrial court's statute, but this is far from holding that an order of an administrative tribunal may be sustained upon facts and circumstances not established at a hearing and upon notice as required by the statute delegating powers to administrative tribunals. In the late case of *Wichita Railroad & Light Company* v. *Public Utilities Commission* decided by this court at the present term (Nov. 13, 1922, 43 Sup. Ct. Rep. 51, 55) this court, with reference to an order made by the Kansas Public Utilities Commission, said:

> "We conclude that a valid order of the commission under the act must contain a finding of

fact, after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case is void.

This conclusion accords with the construction put upon similar statutes in other states. *Public Utilities Commission* v. *Springfield Gas Co.*, 291 Ill. 209, *Public Utilities Co.* v. *B. & O. S. W. R. R. Co.*, 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities and also in the creation of administrative boards to apply to the myriad details of rate schedules, the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking the order is ineffective."

In considering the validity of acts passed by a legislature, doubtless this court may notice matters within common knowledge, but cannot thus supply the lack of evidence of conditions precedent to the lawful exercise of delegated power. This case deals with orders made by a legislative tribunal exercising delegated powers. It

is in the statute, evidence and findings shown upon the record, counsel must find justification for these orders, not in matters of common knowledge which might be urged to sustain original legislative enactments. The Kansas legislature could not, and did not, delegate to the industrial court power to determine upon what conditions wages, hours of labor and conditions might be regulated in packing houses; nor what controversies would justify interference between employers and employes engaged in this industry. Such legislative power could not be, and was not, delegated by this statute. In creating the industrial court the Kansas legislature, to prevent pure delegation of legislative power, enjoined upon it a certain course of procedure and certain rules for the performance of its functions. The act is full of such provisions. Section 3 declares certain industries to be affected with a public interest and "subject to supervision by the court as herein provided." Section 5 prescribes the rules of evidence for the taking of testimony and its perpetuation. Section 7 prescribes and limits the character of controversies over which the industrial court shall have jurisdiction. It requires that parties interested shall be summoned, investigations made, evidence taken followed by findings, etc.

Section 9 reads:

> "It is hereby declared necessary for the promotion of the general welfare that workers engaged in any of said industries, employments, utilities or common carriers shall receive at all times a fair wage and have healthful and moral surroundings while engaged in such labor; and that capital in-

vested therein shall receive at all times a fair rate of return to the owners thereof. The right of every person to make his own choice of employment and to make and carry out fair, just and reasonable contracts and agreements of employment, is hereby recognized. If, during the continuance of any such employment, the terms or conditions of any such contract or agreement hereafter entered into, are by said court, in any action or proceeding properly before it under the provisions of this act, found to be unfair, unjust or unreasonable, said Court of Industrial Relations may by proper order so modify the terms and conditions thereof so that they will be and remain fair, just and reasonable and all such orders shall be enforced as in this act provided."

Section 10 reads:

"Before any hearing, trial or investigation shall be held by said court, such notice as the court shall deem necessary shall be given to all parties interested by registered U. S. mail addressed to said parties to the post office of the usual place of residence or business of said interested parties when same is known, or by the publication of notice in some newspaper of general circulation in the county in which said industry or employment, or the principal office of such utility or common carrier is located, and said notice shall fix the time and place of said investigation or hearing. The costs of publication shall be paid by said court out of any funds available therefor. Such notice shall contain the substance of the matter to be investigated, and shall notify all persons interested in said matter to be present at the time and place named to give such testimony or to take such action as they may deem proper."

With reference to these provisions Commissioner Noble concluded as matter of law (R. 128) "No order

of the industrial court is authorized except upon notice whether the investigation be instituted by complaint to the court or upon the court's own initiative. Section 10 of the act makes notice jurisdictional * * *." This view of the statute was approved by the Supreme Court (R. 146), and exceptions of the plaintiff in error to certain parts of the order of May 2, 1921, sustained, because of the failure to comply with the requirements of Section 10.

These provisions of the act and the interpretation placed upon them by the Supreme Court convince that it was indispensably necessary to the exercise of the jurisdiction conferred that the prescribed conditions should exist; that such conditions should be established by evidence, that findings based upon such evidence should be made, and, that the orders should be sustained by such evidence and findings.

The evidence taken before the industrial court is abstracted in this record (pp. 183 to 216). This testimony was taken upon a complaint filed on January 19, 1921 (R. 2), and at a hearing beginning March 3rd, and ending March 11, 1921 (R. 2). Without fear of successful contradiction, counsel for the plaintiff in error asserts there is neither evidence nor finding in the transcript in this case supporting the broad allegation of emergency in the statement of the defendant in error's complaint and petition. Attention is directed to the opinion of the industrial court filed on May 2, 1921 (R. 13-21). Except for a repetition in this opinion of the statement in the complaint of the existence of a contro-

versy, substantially in the language of Section 7, there is not a word indicating that any evidence was introduced tending to sustain this allegation. In the elaborate findings made a part of this opinion (R. 19, 20, 21) there is no reference whatever to an emergency.

The theory upon which counsel for the industrial court expect this court to consider facts and circumstances not shown upon the record and occurring after the hearing and decision by the industrial court is the theory upon which two of the judges of the industrial court proceeded in making the so-called temporary order of March 21, 1921 (R. 11), and is plainly stated by Hon. J. A. McDermott, one of the judges of the court, in his testimony before the commissioner (R. 49), where he said:

> "On March 21, 1921 (after the hearing had been concluded) there was threatened a strike by the Amalgamated Meat Cutters and Butchers Union, of which the employes of this plant were a part.
>
> Q. How did you know that?
>
> A. By general information that every other citizen got; it had reached the point where the strike had been voted and called and the Federal Government, the President of the United States, had called the packers and representatives of these unions to meet with the Secretary of Labor and Commerce on Wednesday; I think the strike had been voted to be called a day or two later than that. On Thursday or Friday a temporary adjustment was made through the efforts of the two secretaries mentioned and while this national strike was impending, which would involve the Wolff Packing Company, we felt, knowing by general information the

> controversy that existed nationally which was with reference to overtime and the reduction of wages, that a temporary order made by this court would probably avert a strike in the Wolff Packing Company plant."

Counsel for the packing company respectfully submit that this theory is opposed to the settled decisions in this court concerning the jurisdiction and powers of administrative tribunals of the character of the industrial court. In a number of cases presented to this court involving the validity of orders of the Interstate Commerce Commission and similar administrative bodies, it is consistently held not only that the conditions prescribed by statute must exist, but that the record must affirmatively establish the facts upon which the jurisdiction depends. In every case where it appeared from the record that orders made by these administrative tribunals were based upon information obtained by members of the commission, as shown in the testimony of Mr. McDermott, this court has held them invalid because opposed to the constitutional rights of the party affected by the order to a hearing.

In *United States* v. *B. & O. Ry.*, 226 U. S. 14-20, involving an order entered by the Interstate Commerce Commission, this court said:

> "We remark that it is stated in the commission's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based upon

> specific investigations made in the case without notice to them. See *Washington, etc.*, v. *Fairchild*, 224 U. S. 510, 525. Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record and the facts thus noticed are specified, so that matters of law are saved."

In *Oregon Railway Co.* v. *Fairchild*, 224 U. S. 510, 533, with reference to orders of the Washington Railway Commission, this court said:

> "The insufficiency of the evidence submitted to the commission could not under this statute be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established."

In *Interstate Commerce Commission* v. *Louisville & Nashville Railway Co.*, 227 U. S. 89, this court reviewed an order made by the commission prescribing commodity rates. It appears that the commission made a single order in which it held the class rates complained of to be unreasonable, directed the old local rates to be restored, and a corresponding reduction in through rates. The railroad filed a bill to enjoin the commission from enforcing the order. At the hearing the railroad exhibited all that had been introduced before the commission, as a basis for the contention that the evidence before the commission utterly failed to show that the rates attacked by the complaint passed upon by the commission were unreasonable. The trial court held

that the order was void because there was no material evidence to support it. Answering a contention of the government based upon a provision in the statute that rates should be set aside if after a hearing "the commission shall be of the opinion that the charge was unreasonable," this court said (p. 91):

> "But the statute gave the right to a full hearing and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depend upon facts, the commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi*-judicial in character, are void, if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' (Citing cases.) Or if the facts found do not as a matter of law support the order made."

(p. 93) "The Government further insists that the Commerce Act requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative

power to make rates, it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute."

With reference to the informality of proceedings before the commission this court remarked that it was not limited by the strict rules which prevail in suits between private parties. "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown but presumptively sufficient information to support the finding."

The necessity for proof that serious discomfort would result to the people of Kansas because of a short-

age of their food supply, as a condition precedent to the making of the orders now in question, is accentuated by a comparison of Section 7, authorizing compulsory orders, and Section 21, providing for the voluntary submission of controversies between employers and employes "as to wages, hours of employment, or working or living conditions, in any industries not hereinbefore specified * * *." The cases under Section 7 must involve controversies endangering the public peace or threatening the public health. Cases under Section 21 need not be of so serious a nature. Where the controversy is not shown to endanger the public peace or threaten the public health, the industrial court has no authority to proceed under Section 7. It necessarily follows that unless the record discloses a controversy endangering the public peace or threatening the public health, and findings made by the industrial court based upon such evidence, the order attempting "to settle and adjust all such controversies by such findings and orders," is ineffective and void because the exercise of the delegated power is not authorized except upon the existence of such controversy.

The packing company claims that it was entitled to an opportunity by proof and argument to controvert the claims asserted in the complaint filed in the industrial court, before a tribunal bound not only to listen, but to give legal effect to the facts established by the evidence. In the absence of any showing by the industrial court that a controversy existed such as endangered the public peace or threatened the public health, the packing com-

pany was not called upon to introduce any evidence to the contrary. But in this case it did introduce evidence abundantly establishing: (a) That its contribution to the food supply of Kansas was very small; (b) that it was ready, able and willing to go on with its operations with employes satisfied to accept the wages it felt able to pay; (c) that none of its employes had left its service because of dissatisfaction on account of wages; (d) that it could not afford to pay any increase in wages over those offered; and, generally, that its management was able to go on with the corporate enterprise unaffected by the dissatisfaction of a few of its employes with the wages it was able to pay. In such circumstances the orders now in question were made without jurisdiction and for that reason alone are void.

On the question of confiscation resulting from the order of May 2, 1921.

The contention of the plaintiff in error that the effect of the order in question was to increase the packing company's operating expenses and therefore confiscate its property at a time when it was unable to make any return upon its investment is resisted by the industrial court apparently on several grounds. It is claimed that the packing company did not show the ~~question~~ causes of the losses it had sustained and that at all events the order was temporary and it would not have cost more than $6,000.00 for the packing company to put it into effect for a sixty day period.

The commissioner found (R. 126) neither the losses in operation nor the reduction in operations during the six months ending on April 30, 1921, were caused by any inability of the respondent to secure sufficient workmen at the wages paid."

He further said (R. 126): "The losses of the packing company in the operation of its plant have been heavier during the existence of the working contract of May 10, 1920, than at any other period, and the losses in operation, so far as amount is concerned, may be accounted for in the combination of depreciation in market value of stocks on hand and bonus and extra pay for overtime covered by that contract.

In other words, Mr. Noble concluded from the evidence that none of the loss could be attributed to the company's inability to secure a sufficient number of employes at the wages it was willing to pay, and that the depreciation in the value of its products on hand and the large wages it was compelled to pay under the contract which expired before it made the reduction caused the large amount of the loss. An examination of the financial statements referred to in the first brief shows that the sale for the year ending October 30, 1920, was $7,440,725.00, an average of $620,000.00 per month, whilst for the six months ending April 30, 1921, the sales averaged $380,000.00 per month. From the same source it may be seen that the capacity of the plant is about 5000 hogs per week and that only about 2800 hogs per week were killed and cured during the six months ending April 30, 1921. These findings should

be sufficient to convince business men that the reason for the losses, over and above the increase in the pay roll due to the large wages and bonus under the expired contract, is the enormous reduction in the market price of packing house products and the great shrinkage in the volume of sales. It is a business axiom that profits in a manufacturing plant cannot be expected unless operated continuously to capacity. When packing house owners cannot sell their products plant operations must be cut down because storage capacity is soon exhausted. Cutting down operations always and inevitably means loss. The financial statements furnished to the commissioner and appearing in the record account for every penny of revenue received during the several periods.

The expense and income statements go into minute details of the expenditures. All of these items were allowed by the commissioner as legitimate charges against income, except the items of bond interest, central office and administration expenses. The industrial court's accountant was given free access to the packing company's books. Counsel for the industrial court cross examined the accountants at great length. Commissioner Noble asked them many questions; yet, none of the testimony suggested or intimated that any part of the money arising out of the plant's operations had been used in the operation of other plants conducted by the Allied Packers, Inc. Such a charge would be baseless if made and cannot be sustained, even by inference upon the record. Again reference is made to counsel's admission made for the purpose of an argument in the hearing before the

industrial court. With reference to this the commissioner says (R. 159):

> "This admission was not justified in the facts unless such losses are reflected in the central office administration charges heretofore mentioned in these findings, and which are eliminated as operating expenses of the Wolff Plant."

It is difficult to see how it would be possible for the packing company to have done more than it did do to throw a strong light upon all of its transactions and to give the industrial court and the Supreme Court's commissioner every opportunity and assistance in arriving at the facts. None of the expenditures, except bond interest, central office and administration expenses, were criticised by counsel or the commissioner. These items were not considered in making up the commissioner's findings as to the actual losses sustained by the packing company. Excluding these items, it was established to the point of demonstration that for the years 1919, 1920 and 1921, up to the time of the hearing, the operations of the packing company had resulted in continuous loss. It is submitted, therefore, that no ground exists for the suggestion in the industrial court's brief that the cause and extent of the losses is unexplained upon this record.

The industrial court complains that the packing company should have made a trial under the order for sixty days and quotes from Section 8 of the industrial court's statute to the effect that if either party to a controversy covered by Section 7 shall comply with an order of the industrial court for sixty days "and shall

find said order unjust, unreasonable or impracticable, said party may apply to said Court of Industrial Relations for a modification thereof and said Court of Industrial Relations shall hear and determine said application and make findings and orders in like manner and with like effect as originally." It is further complained that nothing stood in the way of the packing company coming to an agreement with its employes. The order of May 2, 1921, provides that it shall continue until changed by the court or changed by agreement of the parties *with the approval of the court*.

It is further said in the brief that improvement in wages and terms of employment naturally would have resulted in a better service from the workers (p. 66 of the Brief).

On page 69 it is said:

> "A trial by the packing company of the industrial court's order for sixty days would have made no substantial difference in the expenditures of the packing company as compared to the amount of its receipts and expenditures * * *. Allowing thirty days further for the time of hearing before the industrial court and a decision on the question of modification of the order, the increased payments for the ninety days would have been a little over $6,000.00. In business of the size of the packing company, that is a very small amount."

Are we to understand that the packing company can be required by legislation to turn over $6,000.00 of its capital to its employes so as to enable the industrial court to determine the effect of an experiment. It seems to counsel for the packing company that this suggestion

is without merit. No reason is perceived why $6,000.00 of the stockholders' money should be turned over to the employes, any more than there is reason for turning over to the employes the whole of the capital, property, business and affairs of this corporation. The $6,000.00 referred to by counsel was the private property of the owners of this property. It was as much protected under the Fourteenth Amendment to the Constitution as though it had been $6,000,000.00.

After a careful consideration of the arguments advanced by the industrial court, the packing company takes leave to say that the questions involved in this writ of error are whether the State of Kansas can fix the wages to be paid by owners of packing houses to packing house employes and by increasing the company's pay roll cause it to suffer additional loss at a time when its operating expenses and costs of raw material exceed its revenue from sales. If this can be done by the Kansas legislature the judgment of the Kansas Supreme Court can be affirmed. If the owners of this property are protected by the Fourteenth Amendment forbidding any state to deprive any person within its jurisdiction of his life, liberty or property without due process of law, and forbidding the denial to any person of the equal protection of the laws, this judgment should be reversed because the order it seeks to enforce is void.

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